No. 20-1215

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,
v.
ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REPLY IN SUPPORT OF PETITION FOR INITIAL HEARING EN BANC

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Appellee Mayor and City Council of Baltimore (the "City") submits this reply in support of its petition for initial hearing en banc.

1. This case warrants initial hearing en banc because it involves a question of exceptional national importance. Appellants do not dispute the case's importance. They acknowledge that "the question whether the rule is arbitrary and capricious is undoubtedly important." Dkt.20 ("Opposition.") at 1, 6-7. In fact, so important that they have sought a stay of the district court's final judgment in this case, even though this Circuit has never stayed a district court's final judgment vacating and permanently enjoining an agency rule in the 75 years since the Administrative Procedure Act's enactment in 1946. Not once. The legal principle at stake in this appeal is also significant. The en banc Court should reaffirm that the Administrative Procedure Act (APA) requires reasoned decisionmaking and explanations even when the issue involved is politically charged and controversial.

2.a. This case is just as important as other cases where this Court and other courts of appeals have granted initial hearing en banc. *Contra* Opposition.8-9 & n.1. In fact, the Ninth Circuit considered the precise

question presented in this appeal important enough to grant initial hearing en banc in *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020).

2.b. Ruling for the City would likely create a Circuit conflict with the en banc Ninth Circuit. But that makes en banc review in this case more important, not less. *Contra* Opposition.1,7. If the Fourth Circuit is going to issue a decision that conflicts with an en banc decision of the Ninth Circuit, it should be issued by the en banc Court, not a three judge panel.

2.c. The City seeks to elevate this case to the en banc Court for three reasons: (1) the case involves an issue of exceptional national importance; (2) ruling for the City would likely create a conflict with the en banc Ninth Circuit; and (3) affirmance by the en banc court is likely to bring this appeal to a close sooner, which would allow the City to reenter the Title X program sooner. The City certainly does not seek "an end-run around a panel of this Court." Opposition.1,9.

3. The City is likely to win this appeal on the merits. Try as they might, Appellants cannot avoid the fact that HHS committed serious errors in its consideration of the facts and evidence in this rulemaking. Those errors were so grave they "compelled" the district court to conclude

that the Rule is "inadequately justified and objectively unreasonable." *Mayor & City Council of Baltimore v. Azar*, No. CV RDB-19-1103, 2020 WL 758145, at *1, *6, *8, *11 (D. Md. Feb. 14, 2020) ("Opinion."). As the district court held, three errors rendered the Rule arbitrary and capricious.[1]

3.a. *First*, HHS's conclusion that the Rule is consistent with medical ethics was arbitrary and capricious. Opinion.*8-*10. The Administrative Record is replete with evidence establishing that the Rule's referral limitations—requiring medical providers to withhold advice from patients about where to go for further treatment—violate the consensus view of medical ethics in the United States. *Id.* As the Court below put it succinctly,

> HHS was not required to demonstrate that any professional organization supported the Rule, *but it was required* to provide a reasoned explanation for its disagreement with the medical ethics concerns of every major medical association in

[1] Contrary to Appellants' claim, *Rust v. Sullivan*, 500 U.S. 173 (1991), does not exempt HHS's conclusions or explanations today from the APA's reasoned decisionmaking requirements. The 1988 Rule that the *Rust* Court upheld was issued and upheld based on a different Record. The question here is whether HHS provided adequate justifications and reached reasonable conclusions on the basis of the Record before it in this rulemaking. HHS's new Rule must stand on its own foundation.

> the country, while simultaneously finding the Final Rule consistent with medical ethics."[2]

Id. at *10 (emphasis added)). This HHS failed to do.

For example, the American Medical Association (AMA), the organization that issues the *Code of Medical Ethics*, stated that "[t]he inability to counsel patients about all of their options in the event of a pregnancy *and to provide any and all appropriate referrals*, including for abortion services, are contrary to the AMA's *Code of Medical Ethics*."[3] *See* AMA Comm't, at 3, http://bit.ly/2Zexyyi (emphasis added) (citing Opinion E-1.1.3). HHS did not address the comment; all HHS said was

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[2] Appellants mischaracterize the district court's opinion by quoting only the first phrase of this sentence. Opposition.11. They ignore that the court recognized that because HHS concluded that the Rule is consistent with medical ethics, it was required to provide a reasoned explanation for its disagreement with the unanimous opinion of experts as reflected in the Administrative Record.

[3] The Ninth Circuit stated that the AMA misinterpreted its own *Code of Medical Ethics*. *See California v. Azar*, 950 F.3d 1067, 1088 (9th Cir. 2020). Even if that were true, that was not the stated basis for HHS's conclusion. See 84 Fed. Reg. at 7724, 7748. HHS provided no reason for its decision to "disagree" with the AMA's conclusion, and AMA's interpretation of its own *Code of Medical Ethics* is likely to be correct. If HHS disagreed with the AMA's interpretation of its *Code of Medical Ethics*, HHS needed to provide a reasoned explanation for its disagreement. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

that it "disagreed" with every commenter that the Rule violates medical ethics.[4] 84 Fed. Reg. at 7724, 7748.

Similarly, the American College of Obstetricians and Gynecologists ("ACOG"), an organization representing more than 90% of the board-certified obstetricians and gynecologists in the United States, told HHS that the referral restriction would "place physicians in ethically compromised situations" and violate ACOG's Code of Professional Ethics. Opinion.*8-*9; ACOG Comment at 3-6, http://bit.ly/2ZjlEDt. Commenters also brought to HHS's attention a piece published in the *New England Journal of Medicine,*[5] that discusses ACOG's Ethics Committee Opinion No. 385, *The Limits of Conscientious Refusal in*

[4] HHS thus similarly summarily dismissed comments from numerous other medical organizations informing HHS that the Rule violated medical ethics. *See* American Academy of Family Physicians ("AAFP") AR104075, https://bit.ly/2SEl2VQ; American College of Physicians ("ACP") AR281203, https://bit.ly/2Yd6jCs; American Academy of Nursing ("AAN") AR107970, http://bit.ly/2VS2Hpi; and American Academy of Pediatrics ("AAP") AR 277786, https://bit.ly/32OLd0I.

[5] Janet Bronstein, Ph.D., *Radical Changes for Reproductive Health Care—Proposed Regulations for Title X*, at 2 & n.3 (July 18, 2018), https://www.nejm.org/doi/full/10.1056/NEJMp1807125.

Reproductive Medicine,[6] noting that "physicians who object to providing certain types of information or services have a duty to refer patients to others who will do so." Morman Comment, https://bit.ly/39cvsma.

The comment of the National Family Planning and Reproductive Health Association ("NFPRHA")—which includes more than 80% of the pre-Rule Title X grantees and 66% of subrecipients—also went unaddressed. NFPRHA informed HHS that the Rule violated numerous ethics codes and HHS's own Quality Family Planning Guidelines ("QFPs") which state that the provision of pregnancy test results should be "followed by a discussion of options and appropriate referrals." *See* NFPRHA Comment, at 5-6 & n.23, http://bit.ly/2VVVOmw (quoting CDC, *Providing Quality Family Planning Services: Recommendations of CDC*

[6] *See* American College of Obstetricians and Gynecologists Committee on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine*, No. 385 (November 2007), *reaffirmed* 2019, http://bit.ly/2XRZZ4I ("Conscientious refusals that conflict with patient well-being should be accommodated only if the primary duty to the patient can be fulfilled. All health care providers must provide accurate and unbiased information so that patients can make informed decisions. Where conscience implores physicians to deviate from standard practices, they . . . *have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that patients request*." (emphasis added)).

and the U.S. Office of Population Affairs at 14, 63(4) MMWR (Apr. 25, 2014)).

Physicians with expertise in medical ethics also informed HHS that the referral restriction violated medical ethics. *See* Stahl Comment, https://bit.ly/3bauUP8; Chor Comment, https://bit.ly/3bhs8rv; Karlan Comment, https://bit.ly/2wqiJPq; Mullany Comment, https://bit.ly/39aVq9R; McGowan Comment, https://bit.ly/2J7VDQx.

Appellants concede that the Record shows no code of medical ethics, no professional medical organization, and no opinion from an expert on medical ethics that supports HHS's conclusion that the Rule is consistent with medical ethics. Appellants concede that the Rule contradicted the views of literally every major medical organization in the United States and do not dispute that the Rule contradicted HHS's *own* views about the obligations of health care professionals contained in its QFPs.

Instead, HHS's medical ethics "evidence" was that (1) the Supreme Court's decision in *Rust* upholding the 1988 Rule proves that restricting abortion referrals does not violate medical ethics, and (2) federal and state conscience laws that permit doctors to opt-out of making abortion referrals show that the Rule's restriction on provider referrals does not

violate medical ethics.[7] Opposition.11-12. HHS's decision to rely on that "evidence" was irrational. *Rust* never discussed medical ethics, did not suggest a view of the requirements of medical ethics, and resolving the issue was not necessary to the Court's holding in that case.[8] *See* Opinion.*9. Federal conscience laws similarly provide no evidence about the requirements of medical ethics. Legislatures are not bound by the requirements of medical ethics, and conscience statutes can be implemented in ways that differ significantly from the absolute restriction on referrals in the Rule, e.g., by ensuring patients still receive abortion referrals. *See supra* note 6.

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[7] Appellants now seek to rescue HHS's conclusion about medical ethics by making two new arguments that HHS did not rely on: (1) restrictions on abortion referrals in publicly funded programs; and (2) the absence of enforcement actions against Title X providers in the few months since the new Rule took effect. The Court cannot affirm the Rule on these grounds and should disregard these arguments. *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943) (an agency's action "must be measured by what [it] did, not by what it might have done"). In any event, both of these claims depend on facts outside the record, may not be accurate, and tell the Court nothing about medical ethics.

[8] The Ninth Circuit held that *Rust*'s discussion of whether withholding abortion counseling violates a patient's Fifth Amendment rights somehow constituted a holding about the requirements of medical ethics. *California*, 950 F.3d at 1103. But Constitutional limits on State interference with the physician-patient relationship say nothing about the ethical duties of medical providers.

HHS's reliance on a court decision that did not discuss medical ethics, and a collection of laws not designed to implement the requirements of medical ethics—*as evidence of medical ethics*—is breathtakingly irrational and would warrant vacatur in its own right, even if every major medical organization in the country hadn't informed the agency that its Rule violates medical ethics.

3.b. *Second*, HHS's failure to consider any evidence that the Rule would negatively impact Title X patients and providers was also objectively unreasonable. We know HHS did not consider or weigh any of this evidence because HHS said so. HHS repeatedly (mistakenly) stated that there was "no evidence" and no "actual data" of negative impacts on patients or providers in the Record. 84 Fed. Reg. at 7749, 7775, 7780, 7785; Opinion.*10. Appellants seek to excuse this mistake by ignoring it—claiming that HHS considered this evidence but concluded that the evidence that new providers would enter the program outweighed it. Opposition.12-13. But that is exactly what the agency didn't do. HHS did not consider the evidence because it did not believe there was any. Opinion.*10. An agency's failure to consider relevant evidence concerning "an important aspect of the problem" is

quintessential arbitrary and capricious agency action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Judicial deference to HHS's "expertise" and "predictive judgment," Opposition.13, does not require the Court to disregard plain factual errors.[9]

3.c. *Third*, the agency's consideration of the costs of the physical Separation Requirement is perhaps most unreasonable of all. Appellants do not dispute that there is *no* evidence supporting HHS's estimate of a $30,000 one-time cost to comply with the requirement.[10] No one—including HHS and Appellants—has any idea where that $30,000 number came from. The $30,000 number is neither rooted in evidence nor practical reality. The only evidence in the Record shows that $30,000 is orders of magnitude too low. *See Baltimore*, 2020 WL 758145, at *11.

[9] The Ninth Circuit did not address HHS's failure to consider commenters' evidence. *See California*, 950 F.3d at 1100. The Ninth Circuit held that HHS was not required to credit commenters' evidence. *Id.* But the Ninth Circuit failed to address the fact that HHS did not merely decline to credit it, but rather overlooked it.

[10] The Ninth Circuit did not discuss the fact that the $30,000 cost number has no basis in evidence. *California*, 950 F.3d at 1101 n.32.

HHS's underestimate of the total cost of the requirement (even using that erroneous per-site number) by over $200 million is equally unreasonable. Appellants admit that 100% of Title X providers made abortion referrals before the Rule took effect, meaning that the Separation Requirement applied to 100% of then-existing Title X providers, not the 15% the agency estimated. Opposition.14. Appellants try to brush off the error by hypothesizing that most Title X providers that chose to remain in the program would stop making abortion referrals rather than physically separate the parts of their facilities that make abortion referrals from the parts that don't. Opposition.14. But HHS did not reach that conclusion, and this is the first time Appellants have offered that hypothesis. HHS did not realize that the Separation Requirement would apply to abortion referrals and thus failed to consider this issue in its assessment of the Separation Requirement's cost. Here, again, HHS "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and in doing so underestimated the cost of its Rule by roughly seven fold—by over $200 million. That error warrants vacatur in its own right.

* * *

This is a case of nationwide consequence. HHS's Rule has had a devastating impact on the entire Title X program and those it serves, including Baltimore City and its people. For the first time in 50 years Baltimore City is not participating in the Title X program.[11] The Rule affects billions of dollars in annual health care expenditures, and the health care systems of every City and State. And it is marred by basic factual errors. The full Court should hear this case.

CONCLUSION

The Court should grant initial hearing en banc.

[11] Appellants now take issue with Appellee's representation that the Rule was a departure from Title X policies in place for "virtually its entire history." Opposition.10. But the City was *quoting* HHS's *own conclusion* in the 2000 Rule—the Rule HHS's new Rule replaces—that "[t]he policies reflected in, and interpretations reinstituted in conjunction with, the regulations below … have been used by the program for virtually its entire history; indeed, they have been in effect during the pendency of this rulemaking." 65 Fed. Reg. 41270, 41271 (July 3, 2000).

March 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply in Support of Petition for Initial Hearing En Banc was filed electronically on March 23, 2020 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
Andrew T. Tutt

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), the undersigned counsel for appellee certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this brief contains 2,542 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Andrew Tutt*
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